IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl.W.P. No.214 of 2006
Date of decision : 16.3.2007

Ex-Wing Commander A.S.Gill ....Petitioner

Versus

Union of India & another ...Respondents

CORAM : HON'BLE MR. JUSTICE MAHESH GROVER

.....

Present : Mr. B.S.Saini, Advocate
for the petitioner.

Mr.Anil Rathee, C.G.S.C.
for the Union of India.

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MAHESH GROVER, J.

This is a petition under Articles 226/227 of the Constitution of India praying for quashing of a part of Annexure P-2 as being violative of Articles 14, 16 and 21 of the Constitution of India in view of the law laid down by the apex Court in **1998 Cri.L.J. 1402** as also to direct respondent No.2 to write the evidence which is against the prosecution evidence on the basis of which the the findings of the court-martial on Charge No.9 of the charge-sheet (Annexure P-1) have been confirmed, with a further prayer to direct the respondents to remit the case to the general court-martial to reconsider the findings on charges No.10 and 12 and to pass an appropriate order afresh.

At the outset a plea was raised by the respondents that the petitioner has not exhausted the alternate and efficacious remedy

of an appeal provided under the provisions of Section 161(2) of the Air Force Act, 1950 (in short 'the Act') which reads as under :

> **"161. Remedy against order, finding or sentence of court-martial. --** (1) ....
>
> (2) Any person subject to this Act who considers himself aggrieved by a finding or sentence of court-martial which has been confirmed, may present a petition to the Central Government, the Chief of the Air Staff or any prescribed officer superior in command to the one who confirmed such finding or sentence, and the Central Government, the Chief of the Air Staff or other officer, as the case may be, may pass such order thereon as it or he thinks fit."

The aforesaid objection raised by the learned counsel for the respondents was vehemently opposed by the learned counsel for the petitioner to say that the existence of an alternate statutory remedy is no bar to the exercise of a writ jurisdiction and in any eventuality once the sentence awarded by the court-martial had been confirmed, the other authorities provided under the Act, namely, the Central Government was precluded from going into the order of sentence. Hence, only remedy available to the petitioner was by way of a writ jurisdiction. It was further contended that in view of Section 159 of the Act the sentence could be revised only once by the confirming authority and that having been done, further appeal would be an exercise in futility.

I have heard the learned counsel for the parties.

The contention of the learned counsel for the petitioner that there is no other remedy available to him except the present petition is seemingly misplaced. Section 161(2), reproduced above, clearly lays down that after the sentence of court-martial has been confirmed, the petitioner had a right to present a petition to the Central Government which may pass such order thereon as it thinks fit. The language of the statute does not in any way inhibit the power of the Central Government to re-evaluate the sentence passed by the general court -martial.

The argument of the learned counsel for the petitioner that in view of Section 159 the sentence could be reviewed only once is misplaced. Section 159 reads as under :

> "**159. Revision of finding or sentence. --** (1) Any finding or sentence of a court-martial may be once revised by order of the confirming authority and on such revision, the court, if so directed by the confirming authority, may take additional evidence.
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> (2) The Court, on revision, shall consist of the same officers as were present when the original decision was passed, unless any of those officers are unavoidably absent.
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> (3) In case of such unavoidable absence the cause thereof shall be duly certified in the proceedings, and the Court shall proceed with the revision, provided that, if a general court-martial, it shall consist of five officers, or, if a summary general or district court-

martial, of three officers."

It is clear that the embargo to revise the order only once is upon the confirming authority. Section 159 is to be read with Section 157, which confers powers upon the confirming authority to mitigate, remit or commute the sentences. Section 157 is also reproduced below :

"**157. Power of confirming authority to mitigate, remit or commute sentences. --** (1) Subject to such restrictions, reservations or conditions as may be contained in any warrant issued under Sec.153 or Sec. 154 and to the provisions of sub-sections (2) and (3), a confirming authority may, when confirming the sentence of a court-martial, mitigate or remit the punishment thereby awarded, or commute that punishment for any punishment or punishments lower in the scale laid down in Sec.73.

(2) A sentence of transportation shall not be commuted for a sentence of imprisonment or detention for a term exceeding the term of transportation awarded by the Court.

(3) A sentence of imprisonment shall not be commuted for a sentence or detention for a term exceeding the term of imprisonment awarded by the Court."

Thus the confirming authority is vested with the power to mitigate, remit or commute the offence and even revise it and send it

to the court-martial. The order passed by the confirming authority are subject to an appeal before the Central Government which has been empowered to pass such an order thereon as it thinks fit. The aforesaid provisions of law conferring the power to revise the sentence by the confirming authority is amply clear. For the same reasons the power to pass any order against the order of the confirming authority in the Central Govt. would also include the power to commute, mitigate or remit the matter to the court-martial as it is the further appellate authority provided for redressal of a grievance against the confirming authority. The power is unhindered and unambiguous.

A Division Bench of the Delhi High Court in a similar situation also disposed of Writ Petition (Civil) No.5907/2003 titled 'Wg.Cdr.B.D.Jena v. Union of India & Ors.' on 17.1.2006, with liberty to the petitioner to avail the alternate remedy available to him.

Keeping in view the aforesaid, it is deemed appropriate and in the interest of justice to dispose of the present writ petition with a direction to the petitioner to avail alternate remedy provided under Section 161(2) of the Act. If the petitioner takes recourse to this remedy within a period of six weeks from today and files an appropriate appeal under the aforesaid provisions of law, the same shall be disposed of by the competent authority by passing a speaking order in accordance with law and not later than six months from the

date of the receipt of the said appeal/representation.

Disposed of accordingly.

16.3.2007 (MAHESH GROVER)
JUDGE

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